A

Public Prosecutor v Abdul Manaf bin Muhamad Hassan

FEDERAL COURT (PUTRAJAYA) — CRIMINAL APPEAL NO 05–69 OF 2002(W)

B ABDUL MALEK AHMAD PCA, STEVE SHIM CJ (SABAH & SARAWAK) AND ARIFIN ZAKARIA FCJ

7 MARCH 2006

C *Criminal Procedure — Trial — Misdirection — Double presumptions wrongly invoked against accused — Whether court on appeal must consider totality of evidence or must convict on lesser charge only — Whether substantial injustice occurred — Courts of Judicature Act 1964 s 60(1)*

D *Evidence — Presumptions — Drug trafficking — Double presumptions wrongly invoked against accused — Effect of — Misdirection by trial judge — Whether court on appeal must consider totality of evidence or must convict on lesser charge only — Whether overwhelming evidence to convict as charged — Whether substantial injustice occurred — Courts of Judicature Act 1964 s 60(1)*

E

The respondent/accussed was arrested while traveling in a taxi. Small packets containing heroin was found tucked in his waist, the right and left side pockets of his track top and in his trousers pockets. The respondent was charged with the offence F of trafficking in dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'). He was convicted and sentenced to death by the High Court.

On appeal, to the Court of Appeal, it was found that the trial judge had erred in invoking double presumptions against the respondent, ie by first invoking s 37(d) of the Act to establish possession and subsequently invoking s 37(da) of the Act to G establish trafficking. The Court of Appeal then held that under such misdirection of the trial judge, the accused person should be found guilty of the lesser offence of possession only. The respondent was thus sentenced to 16 years imprisonment and 10 strokes of the rotan. The prosecution appealed to this court against the decision of the Court of Appeal.

H The prosecution submitted that notwithstanding the misdirection by the learned trial judge in invoking the double presumptions, it was nevertheless incumbent upon the Court of Appeal to consider the totality of the evidence before the court and come to a finding whether the facts as found by the trial judge would support a conviction under s 39B(1)(a) of the Act.

I

Held, allowing the appeal:

(1) The decision in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 only prohibits the use of double presumptions under ss 37(d) and 37(da) of

the Act. It is, therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under s 37(da) of the Act to support a charge under s 39B of the Act. Conversely, the prosecution may rely on the presumption under s 37(d) to prove possession and seek to prove by affirmative evidence (independent of the presumption under s 37(da)) that the accused was in fact trafficking in the dangerous drugs (see para 17).

(2) The mere act of carrying the drugs is not sufficient to constitute the offence of trafficking (see para 20); *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 and *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 followed. In the present case, judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference was that the respondent was in fact carrying it for the purpose of trafficking. The respondent was not just a passive carrier. Armed with these facts, had the learned trial judge properly directed himself, he would nonetheless have come to the same finding. In the circumstances, the Court of Appeal ought to have applied the proviso to s 60(1) of the Courts of Judicature Act 1964 that no substantial injustice had occurred and uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge (see para 21).

[Bahasa Malaysia summary

Responden/tertuduh telah ditangkap semasa menaiki teksi. Paket-paket kecil mengandungi heroin telah ditemui dalam lipatan seluar di bahagian pinggannya, poket sebelah kanan dan kiri baju treknya dan dalam poket seluarnya. Responden telah dituduh kerana kesalahan mengedar dadah berbahaya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut'). Beliau telah disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi.

Semasa merayu ke Mahkamah Rayuan ia telah diputuskan bahawa hakim perbicaraan telah terkhilaf dalam menggunakan andaian berganda terhadap responden, iaitu pertama dengan menggunakan s 37(d) Akta tersebut untuk membuktikan pemilikan dan berikutnya menggunakan s 37(da) Akta tersebut untuk membuktikan pengedaran. Mahkamah Rayuan kemudian memutuskan bahawa di bawah penyalaharahan hakim perbicaraan itu, tertuduh patut didapati bersalah terhadap kesalahan yang lebih ringan iaitu pemilikan sahaja. Responden oleh itu dijatuhkan hukuman 16 tahun penjara dan 10 sebatan rotan. Pihak pendakwa telah merayu ke mahkamah ini terhadap keputusan Mahkamah Rayuan tersebut.

Pihak pendakwa berhujah bahawa meskipun berlaku penyalaharahan oleh hakim perbicaraan yang bijaksana dalam menggunakan andaian berganda itu, adalah wajib untuk Mahkamah Rayuan menimbangkan keseluruhan keterangan di hadapan mahkamah dan tiba kepada penemuan sama ada fakta tersebut yang diputuskan oleh hakim perbicaraan itu menyokong sabitan di bawah s 39B(1)(a) Akta tersebut.

Diputuskan, membenarkan rayuan tersebut:

(1) Keputusan dalam *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 hanya menghalang penggunaan andaian berganda di bawah ss 37(d) dan 37(da) Akta tersebut. Oleh itu, ia adalah terbuka kepada pihak pendakwa untuk bergantung kepada mana-mana andaian tersebut. Dalam erti kata lain, pihak pendakwa boleh secara positif membuktikan pemilikan tanpa bergantung kepada andaian di bawah s 37(d) Akta tersebut dan hanya bergantung kepada andaian pengedaran di bawah s 39(da) Akta tersebut untuk menyokong pertuduhan di bawah s 39B Akta tersebut. Sebaliknya, pihak pendakwa boleh bergantung kepada andaian di bawah s 37(d) untuk membuktikan pemilikan dan memohon untuk membuktikan dengan keterangan bersetuju (berasingan daripada andaian di bawah s 37(da)) bahawa tertuduh pada hakikatnya mengedar dadah berbahaya (lihat perenggan 17).

(2) Tindakan membawa dadah sahaja tidak memadai untuk membentuk kesalahan mengedar dadah berbahaya (lihat perenggan 20); *Ong Ah Chuan v Public Prosecutor; Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64 dan *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 diikut. Dalam kes semasa, berdasarkan cara dadah dibawa, iaitu dalam paket-paket plastik kecil dan mengambilkira keseluruhan jumlah dadah yang terlibat, inferens munasabahnya adalah bahawa responden memang membawanya bagi tujuan mengedar. Responden bukan pembawa pasif. Berdasarkan fakta-fakta berikut, jika hakim perbicaraan yang bijaksana telah mengarahkan dirinya dengan betul, beliau juga akan tiba kepada penemuan yang sama. Dalam keadaan sedemikian, Mahkamah Rayuan patut menggunakan proviso kepada s 60(1) Akta Kehakiman Mahkamah 1964 bahawa tidak berlaku ketidakadilan dan mengesahkan sabitan dan hukuman tersebut meskipun berlaku salah arah oleh hakim perbicaraan yang bijaksana (lihat perenggan 22).]

Notes

For presumption of drug trafficking, see 7(1) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 1954–1957.

For misdirection of trials, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 4499–4503.

Cases refered to

Abdillah bin Labo Khan v PP [2002] 3 MLJ 298 (refd)
Haryadi bin Dadeh v PP [2000] 4 MLJ 71 (refd)
Khoo Hi Chiang v PP and another appeal [1994] 1 MLJ 265 (refd)
Koh Chai Cheng v PP [1981] 1 MLJ 64 (refd)
Mohamad Yazri bin Minhat v PP [2003] 2 MLJ 241 (folld)
Msimanga Lesaly v PP [2005] 4 MLJ 314
Muhammed bin Hassan v PP [1998] 2 MLJ 273 (distd)
Ong Ah Chuan v PP; Koh Chai Cheng v PP [1981] 1 MLJ 64 (folld)
PP v Tan Tatt Eek and other appeals [2005] 2 MLJ 685 (refd)
Tunde Apatira & Ors v PP [2001] 1 MLJ 259 (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 60(1), 92(1)
Dangerous Drugs Act 1952 ss 2, 12(2), 37(d), 37(da), 39B(1)(a)

Appeal from: Criminal Appeal Notice No W–05–61 of 1997 (Court of Appeal, Kuala Lumpur)

Wong Chiang Kiat (Deputy Public Prosecutor, Attorney General's Chambers) for the appellant.
Gurbachan Singh s/o Bagawan Singh (Bachan & Kartar) for the respondent.

Arifin Zakaria FCJ (delivering judgment of the court):

BACKGROUND

[1] The respondent/accused was charged with an offence of trafficking in dangerous drug under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') in the High Court at Kuala Lumpur. He was convicted and sentenced to death by the said court. On appeal to the Court of Appeal, the conviction and sentence was set aside and substituted with an offence of possession under s 12(2) of the Act and sentenced to 16 years imprisonment and 10 strokes of the rotan. The Prosecution now appeals to this court against the decision of the Court of Appeal.

MATERIAL FACTS

[2] On the early morning of 23 March 1996, acting on information received, a police team headed by ASP Baljeet Singh (SP8) from the Narcotics Division of the Police District Headquarters, Dang Wangi, Kuala Lumpur proceeded to the railway station at Jalan Sultan Hishamuddin, Kuala Lumpur. Upon arrival at the station, he noticed a taxi bearing registration No HW 9677 parked in front of the public telephone booth. He then stopped his car right in front of the taxi, thus preventing the taxi from getting away. SP8 and his men then approached the taxi. He saw two men in the taxi, one seated in the driver's seat and the other seated in the front passenger seat. A search was conducted on the two men. A small packet and RM1,200 were found on the taxi driver. On searching the respondent, a newspaper package was found tucked in his waist containing small plastic packets. From the right side pocket of his track top, another newspaper package was found containing 50 small plastic packets and from the left side pocket three small newspaper packages were found containing 30 small plastic packets. From his trousers pockets, a total of 40 small plastic packets were found. A sum of RM9,000 was also found on him.

[3] Upon examination, the chemist confirmed that the small plastic packets contained heroin having a net weight of 62.09g. The respondent was accordingly charged with trafficking in 62.09g of heroin.

[4] It is common ground that in finding the respondent guilty of the offence as charged, the learned trial judge had invoked the two presumptions under s 37(d) and

s 37(da) of the Act. The Deputy Public Prosecutor, En Wong Chiang Kiat, conceded that by so doing the learned judge had transgressed the rule against double presumptions as enunciated in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273. It was held in that case where a presumption of possession under s 37(d) had been invoked, then the presumption under s 37(da) could no longer be invoked to support a conviction under s 39(B) of the Act. The underlying reasons for the said ruling are as stated by Chong Siew Fai CJ (Sabah & Sarawak) at p 288 which reads:

> Furthermore, the basic or primary facts needed to raise 'deemed' possession and 'deemed' knowledge under s 37(d) of the Act and those required to raise 'presumed … trafficking' under s 37(da) are different. To come to the presumptions of possession and knowledge under s 37(d), one need only to arrive at a finding of having had 'in custody or under … control anything whatsoever containing' the drug (as opposed to the drug itself) whereas to arrive at the presumption of 'trafficking' under s 37(da), a finding of being 'in possession' of the drug is necessary (in addition, of course, to proof of the relevant minimum quantity specified). In view of the above differences, it would be unduly harsh and oppressive to construe the automatic application of presumption upon presumption as contended by the learned deputy public prosecutor — a construction that ought to be adopted only if, upon the wordings of the two subsections, such an intention of the Parliament is clear, which, in our opinion, is not.
>
> In our view, to constitute 'possession' under s 37(da) of the Act, so as to be capable of forming one of the ingredients thereunder thereby giving rise to the presumption of trafficking, there must be an express affirmative finding (as opposed to legal presumption) of possession as understood in criminal law, based on evidence.

Further down at p 291, he added:

> Having considered the submissions of counsel and the learned deputy public prosecutor, and the law applicable including the rules of construction of penal statutes, we were of the view that the word 'found' in s 37(d) must bear the same meaning as the word 'found' in s 37(da). Both require evidential materials in attaining proof thereof and are vastly different from the word 'deemed' employed in the said s 37(da).
>
> In our view, on the wording of s 37(da) as it stands, to read the presumption of possession (ie possession as understood in criminal law, with knowledge) provided in s 37(d) into s 37(da) so as to invoke against an accused a further presumption of trafficking (ie presumption upon presumption) would not only be ascribing to the phrase 'found in possession' in s 37(da) a meaning wider than it ordinarily bears but would also be against the established principles of construction of penal statutes and unduly harsh and oppressive against the accused. We are not unaware that, as a general principle, a statute may place the burden of proof on an accused by necessary implication and without doing so expressly. This depends on the construction of the particular legislation. But a court should be extremely cautious and slow to infer from a statute that Parliament intended to impose on the defendant an onerous duty to prove his innocence in a criminal case. Furthermore, offences involving the trafficking of dangerous drugs are among the most serious in the criminal calendar. Any ambiguity in s 37(da) should be resolved in favour of the accused by placing the burden of proving possession of the substances involved on the prosecution.
>
> We would further add that in so construing as we do, we see no injustice to the prosecution. In a proper case where the evidence so warrants and the amount of the dangerous drug reaches or exceeds the quantity specified in s 37(da), there is nothing to prevent a trial court from coming to a factual finding of possession as understood in criminal law, thereby attracting the presumption of trafficking under the said s 37(da) which, of course, is rebuttable.

[5] *Muhammed bin Hassan* was reaffirmed by this court in *Public Prosecutor v Tan Tatt Eek and other appeals* [2005] 2 MLJ 685. Ahmad Fairuz Chief Justice at p 700 expressed his unequivocal agreement with the decision of this court in that case. He said:

> Berasaskan taakulan dan nas-nas yang tersebut di atas saya bersependapat dengan keputusan mahkamah ini di dalam kes *Muhammed bin Hassan* bahawa anggapan pemilikan di bawah s 37(d) Akta itu tidak boleh disifatkan sebagai kesaksian pemilikan di bawah s 37(da). Alasan-alasan penghakiman mahkamah ini di dalam kes *Muhammed Hassan* adalah begitu terperinci dan rasional hinggakan, pada saya, ianya tidak wajar diganggugugat.

In English, it reads:

> Based on fairness and the authorities cited aforesaid I am in agreement with the decision of this court in *Muhammed bin Hassan* that the presumption of possession under s 37(d) of the Act shall not be considered as proof of possession under s 37(da). The grounds of judgment of this court in *Muhammed Hassan* was so detail and rational, to my mind, it should not be disturbed.
>
> (The translation is ours.)

At p 708, Abdul Malek Ahmad PCA in dismissing the contention of the prosecution said:

> Now, what does s 37(d) of the Act say? Any person who is found to have had in custody or under his control anything whatsoever containing any dangerous drug shall, until the contrary is proved, be deemed to have been in possession of that drug and shall, until the contrary is proved, be deemed to have known the nature of such drug. If he has custody or control, he is deemed to be in possession and deemed to know the nature of the drug.
>
> As for s 37(da) of the Act, it does not start with 'any person who is deemed in possession' shall be presumed to be trafficking, in which case it will be considered a consequence of s 37(d) of the Act. Instead, the word 'found' is inserted and so there must be a finding of possession first before the presumption of trafficking comes about. It is, therefore, my considered opinion that the decision in *Muhammed bin Hassan* is correct.

THE FINDING OF THE COURT OF APPEAL

[6] The Court of Appeal after considering *Muhammed bin Hassan*, *Abdillah bin Labo Khan v Public Prosecutor* [2002] 3 MLJ 298 and *Haryadi bin Dadeh v Public Prosecutor* [2000] 4 MLJ 71 rejected the submission of the prosecution urging the court to consider the totality of the evidence before the court. Mokhtar Sidin JCA who delivered the judgment of the court quoted extensively the judgment of the Federal Court in *Haryadi bin Dadeh v Public Prosecutor* in support of their finding (see *Abdul Manaf bin Muhamad Hassan v Public Prosecutor* [2003] 4 MLJ 374).

[7] The learned judge then went on to make this critical observation on the issue at hand which reads (at p 382):

> Our observation of the above judgment makes it clear that where there was evidence of actual possession, the trial judge should make a positive finding that there was actual possession of the drug by the accused person and he should not invoke the presumption of

possession under s 37(d) of the Act. If a trial judge invoked s 37(d) of the Act to establish possession even though there was evidence of actual possession and then went on to invoke s 37(da) to establish trafficking, it would be a serious misdirection. We would like to stress this point because time and again, DPPs in their submissions before us have requested this court to look into the totality of the evidence to establish actual possession even though the learned trial judges in their judgments invoked the presumptions under s 37(d) to establish possession and s 37(da) to establish trafficking. Following the decision of *Haryadi bin Dadeh*, the Federal Court makes it very clear that even though there is evidence of actual possession on the part of an accused person, and despite that the learned judge invokes s 37(d) to establish possession and then goes on to invoke the presumption under s 37(da) to establish trafficking, the learned judge had misdirected himself and in such a situation an accused person should be given the benefit of the doubt. The accused person should be found guilty of the offence of possession only.

Turning to the present appeal, the learned judge in coming to the conclusion that the appellant was guilty of the offence of trafficking, invoked the double presumptions and as such had seriously misdirected himself. Furthermore, as we have stated earlier, there was no evidence of actual possession on the part of the appellant, which makes this case much weaker than the case of *Haryadi bin Dadeh*..

For the above reasons, the Court of Appeal allowed the appeal and set aside the conviction and sentence imposed by the High Court.

SUBMISSIONS OF PARTIES

[8] The prosecution submitted that notwithstanding the misdirection by the learned trial judge in invoking the double presumptions, it is nevertheless incumbent upon the Court of Appeal to consider the totality of the evidence before the court and to come to a finding whether the facts as found by the trial judge would support a conviction under s 39B(1)(a) of the Act. He contended that each case has to be decided on its own merit. In the present case, taking the point that there was insufficient evidence to support a factual finding of possession as found by the Court of Appeal but the Court of Appeal in the final analysis did find that there was sufficient evidence of custody and control of the packets containing the drug by the respondent as to invoke the presumption of possession under s 37(d) of the Act, therefore, the finding of learned trial judge of deemed possession under s 37(d) of the Act was affirmed by the Court of Appeal. The learned deputy contended that with the said finding of possession, the Court of Appeal ought to inquire further whether on the facts of this case there was sufficient evidence to support a positive finding of trafficking independent of the presumption under s 37(da) of the Act having regard to the definition of trafficking under s 2 of the Act and the authorities on the point. He submitted that the Court of Appeal had committed an error of law in failing to make such an inquiry and had it done so, it would have found ample evidence to support a finding of trafficking by the respondent.

[9] The learned counsel for the respondent contended that the Court of Appeal was right in relying on *Abdillah bin Labo Khan* and *Haryadi bin Dadeh* and substituting the conviction to one of possession on the premise that the learned trial judge in this case had not make any factual finding of possession. He submitted that since the learned trial judge had erroneously relied on the double presumptions in coming to his finding, the conviction under s 39B of the Act could not stand and the

Court of Appeal had rightly set it aside. In the circumstances, he prayed that this appeal be dismissed.

FINDINGS OF THIS COURT

[10] The facts disclosed that the plastic packets were found on the respondent. In the circumstances, the learned trial judge rightly held that the plastic packets were in the custody and control of the respondent and by virtue of s 37(d) of the Act, the respondent is therefore deemed to be in possession of the said drug and shall until the contrary is proved, be deemed to have known the nature of the drug. The Court of Appeal upheld this finding by the High Court. It then went on to hold, and we must say rightly so, that in the circumstances, it is not open to the court to call in aid the presumption under s 37(da) bearing in mind the bar against the use of double presumptions following *Muhammed bin Hassan*. Having so held, the Court of Appeal then substituted the conviction to that of possession under s 12(2) of the Act. In so holding, the Court of Appeal expressed the view that where the trial court had invoked s 37(d) of the Act to establish possession and then went on to invoke s 37(da) of the Act to establish trafficking, that would be a misdirection. In those circumstances, the accused person should be found guilty of the lesser offence of possession only.

[11] In coming to the finding, the Court of Appeal relied heavily on the decision of this court in *Haryadi bin Dadeh*. It is pertinent therefore to consider the position in the said case. There, the accused person was charged with an offence of trafficking under s 39B of the Act. The learned trial judge found sufficient evidence showing that the accused person had custody and control of 251.06g of cannabis. He then invoked the presumption of possession and of trafficking under ss 37(d) and 37(da)(vi) of the Act and called the accused to enter upon his defence on the charge. The learned trial judge found the accused guilty based on the totality of the evidence before him. On appeal, the finding of the learned trial judge was affirmed by the Court of Appeal. The accused appealed to the Federal Court, which allowed the appeal and reduced the charge to one of mere possession under s 6 of the Act. The Federal Court speaking through Chong Siew Fai CJ (Sabah & Sarawak) stated (at p 76):

> Having considered the evidence adduced and the submissions of counsel for both sides, we unanimously allowed the appeal as aforesaid. The ratio decided in *Muhammed bin Hassan*, is clear. One cannot rely on the presumption of possession under s 37(d) of the Act to invoke a further presumption of trafficking under s 37(da) of the Act. In the instant case under appeal, the learned trial judge held that the appellant was in possession of 251.06g of cannabis. It would have been in order if, based on the express finding of possession, he proceeded to invoke the presumption of trafficking under s 37(da) of the Act. But this was not what he did. Immediately thereafter, he found the appellant in custody and control of the cannabis and held that therefore the presumption of possession under s 37(d) of the Act applied. He then went on to say likewise because the accused was in possession of more than 200g of cannabis, the presumption of trafficking under s 37(da)(vi) of the Act applied. Towards the conclusion of his judgment, the learned trial judge said, inter alia, that the appellant had failed to rebut the statutory presumptions under s 37(d) of the Act (presumed possession) and s 37(da)(vi) (presumed trafficking) of the Act. By making a finding of possession and then relying on the provision of presumed possession under s 37(d) of the

> Act, the learned trial judge had seriously misdirected himself and leaves us in serious doubt as to whether he was making a finding of actual possession or was relying on presumed possession under s 37(d) of the Act. The benefit of doubt ought, in our view, be given to the appellant.

[12] In *Abdillah bin Labo Khan*, the Court of Appeal observed that a positive finding of possession ought to be made by the trial judge at the close of the prosecution's case not at the close of the defence case. In delivering judgment of the court, Gopal Sri Ram JCA said (at p 303):

> There are two other submissions made by the learned deputy that require to be addressed. The first is her argument that the trial judge did in fact make a specific finding to the effect that the appellant was found in possession of the drugs in question. However, it is to be observed that this finding was made in the concluding passage of his judgment, after he had considered and dealt with the appellant's evidence in defence to the charge. That in our view is, with respect, wholly inadequate. The direction, if any, should have been administered by the trial judge unto himself when he was considering the evidence led by the prosecution. In other words, it should have been done at the close of the prosecution's case …

[13] The above authorities seem to support the view that in order to sustain a conviction for an offence under s 39B of the Act, there has to exist a positive finding of possession by the trial judge independent of the statutory presumption under s 37(d) of the Act and such a finding has to be unequivocal. Thus, in *Haryadi bin Dadeh*, this court held that it is a serious misdirection for the trial judge to make a positive finding of possession and at the same time went on to rely on the presumption of possession under s 37(d) of the Act. This court observed that such an action would leave the court in doubt as to whether the trial judge was making a positive finding of possession or was in fact relying on the presumption under s 37(d) of the Act. In the circumstances, the benefit of the doubt was given to the appellant. Against that, we have the case of *Tunde Apatira & Ors v Public Prosecutor* [2001] 1 MLJ 259 where the Federal Court, relying on the proviso to s 92(1) of the Courts of Judicature Act 1964 ('CJA'), held that as a general rule, the appellate court will in normal course of events, quash a conviction where there has been a misdirection. Exceptionally, it said, a conviction will be upheld despite a misdirection where the court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. In other words, the court would still uphold the conviction despite the misdirection where no miscarriage of justice has been detected. In that case, the appellants were convicted of the offence of trafficking in drugs contrary to s 39B of the Act. The appellants were convicted by the High Court and on appeal to the Court of Appeal the conviction was upheld by the Court of Appeal. Before the Federal Court, it was contended for the appellants that the approach adopted by both courts was contrary to the decision in *Muhammed bin Hassan* in that the courts below had resorted to the double presumptions under ss 37(d) and 37(da) of the Act.

[14] At p 265, Gopal Sri Ram JCA, delivering judgment of the court, stated thus:

> The totality of the evidence reasonably supports the conclusion that the appellant were in actual possession of the prescribed drug at the time of their initial detention. It follows that

even if the learned trial judge and the learned judges of the Court of Appeal had directed themselves in accordance with the law as laid down by this court in *Muhammed bin Hassan* they would have arrived at the identical conclusion. To put it in another fashion, a reasonable tribunal armed with the same facts and properly directing itself would have concluded that the appellants were found in actual possession of the heroin in question, that is to say, independently of the presumption in s 37(d) of the Act. Since the quantity of the heroin so found in the possession of the appellants was several times greater than the statutory minimum of 15g, the court was entitled to conclude that they were trafficking in the said drug.

The course open to this court upon such a conclusion as aforesaid is not in doubt. Generally speaking, an appellant who is able to demonstrate a misdirection of law is entitled to have his conviction quashed. And an appellate court will, when there has been a miscarriage of justice, intervene and set aside a conviction where there has been withheld from an accused a rule of law operating in his favour: *Chiu Nang Hong v PP* [1965] 1 MLJ 40.

The expression 'miscarriage of justice' appears in the proviso to s 92(1) of the Courts of Judicature Act 1964. A similar expression, 'failure of justice' appears in s 422 of the Criminal Procedure Code. They mean the same thing. For, the same result follows when justice either fails or miscarries. The proviso reads as follows:

Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.

The way in which the proviso is to be applied has been considered in several cases. Three of these deserve mention.

In *Mraz v the Queen* (1955) 93 CLR 493 at p 514, Fullagar J, when addressing a similar provision in the New South Wales Criminal Appeal Act 1912 said:

> It is very well established that the proviso to s 6(1) does not mean that a convicted person, on an appeal under the act, must show that he ought not to have been convicted of anything. It ought to be read and it has in fact always been read, in the light of the long tradition of the English criminal law that every accused person is entitled to a trial in which the relevant law is correctly explained to the jury and the rules of procedure and evidence are strictly followed. If there is any failure in any of these respects, and the appellant may thereby have lost a chance which was fairly open to him of being acquitted, there is, in the eye of the law, a miscarriage of justice. Justice has miscarried in such cases, because the appellant has not had what the law says that he shall have, and justice is justice according to law. It is for the Crown to make it clear that there is no real possibility that justice has miscarried.

In *Krishna Murthy v Abdul Subban* (1965) 1 Cr LJ 565 & p 576, Hedge J when dealing with the Indian equipollent of s 422 of our Criminal Procedure Code said:

> The expression 'a failure of justice has in fact occasioned thereby' found in s 535(1), Cr Pc does not connote that the court should be of the opinion that an innocent person has been convicted or the case against the accused person is not made out beyond reasonable doubt. An accused person is entitled to be acquitted whether there was a fair trial or not if no case is made out against him. For that purpose the legislature need not have introduced the conception of 'failure of justice' in ss 535 and 537, Cr PC. The 'failure of justice' mentioned therein is that occasioned by the contravention of the provisions in Chapter XIX, Cr PC. In law the expression 'justice' comprehends not merely a just decision but also a fair trial. Sections 535 and 537, Cr PC have primarily in view a fair trial. For the purpose of those sections a denial of fair trial is denial of justice. One of the

> contents of natural justice, which is so much valued, is the guarantee of a fair trial to an accused person. A fair trial is as important as a just decision. Neither the one nor the other can be sacrificed. Sacrifice of the one, in the generality of cases, is bound to lead to the sacrifice of the other. The two are closely interlinked.

In *Rattan v R* (1974) CLR 510 at p 516. However, Barwick CJ, explained the way in which the proviso is to be applied to particular circumstances. He said:

> Miscarriage is not defined in the legislation but its significance is fairly worked out in the decided cases. There is a miscarriage if on the material before the Court of Criminal Appeal, which where no new evidence is produced will consist of the evidence given at the trial, the appellant is shown to be innocent, or if the court is of the opinion that there exists such a doubt as to his guilt that the verdict of guilty should not be allowed to stand. It is the reasonable doubt in the mind of the court which is the operative factor. It is of no practical consequence whether this is expressed as a doubt entertained by the court itself, or as a doubt which the court decides that any reasonable jury ought to entertain. If the court has a doubt, a reasonable jury should be of a like mind. But I see no need for any circumlocution; as I have said it is the doubt in the court's mind upon its review and assessment of the evidence which is the operative consideration.

> So it comes to this. As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied, that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction. The decision of this court in *Alcontara a/l Ambross v PP* [1996] 1 MLJ 209 exemplifies the general rule, while that in *Khoo Hi Chiang v PP* [1994] 1 MLJ 265 illustrates the exception.

[15] In *Khoo Hi Chiang v Public Prosecutor and another appeal* [1994] 1 MLJ 265, the Supreme Court held that even though the trial judge in that case had applied the wrong test when calling for the defence, the error was of no consequence and did not vitiate the convictions, because even if he had applied the more stringent test, the result would have been the same having regard to overwhelming nature of the case for the prosecution. The court went on to hold that in the circumstances, no substantial injustice had occurred and the court applied the proviso to s 60 of the CJA.

[16] Relying on the above authorities, the prosecution contended that the Court of Appeal in the instant case had erred in failing to apply the proviso to s 60(1) of the CJA in view of the overwhelming evidence against the respondent.

[17] It ought to be stated at the outset that the decision in *Muhammed bin Hassan* only prohibits the use of double presumptions under ss 37(d) and 37(da) of the Act. It is, therefore, open to the prosecution to rely on either of the presumptions. In other words, the prosecution may positively prove possession without relying on the presumption under s 37(d) of the Act and go on to rely on the presumption of trafficking under s 37(da) of the Act to support a charge under s 39B of the Act. See *Tunde Apatira & Ors v Public Prosecutor*; *Msimanga Lesaly v Public Prosecutor* [2005] 4 MLJ 314, a decision of Court of Appeal which was confirmed by this court in Federal Court Criminal Appeal No 05–27 of 2004(K). Conversely, the prosecution may rely on the presumption under s 37(d) to prove possession and seek

to prove by affirmative evidence (thindependent of e presumption under s 37(da)) that the accused was in fact trafficking in the dangerous drug.

[18] We will now consider the facts in the present case. It is the finding of the trial court and affirmed by the Court of Appeal that the drug in question was in the custody and control of the respondent at the material time and invoking the presumption under s 37(d), the respondent is deemed to be in possession of such drug. The respondent failed to rebut the said presumption. In the circumstances, the learned deputy urged this court to consider, whether on the facts of this case, there is sufficient evidence for the court to make an affirmative finding that the respondent was in fact trafficking in the said drug without invoking the presumption under s 37(da).

[19] It is not in dispute that when he was arrested, the respondent was in fact carrying the said drug. Trafficking under the Act, by definition includes carrying. This is found in s 2 of the Act which reads:

> 'trafficking' includes the doing of any of the following acts, that is to say, manufacturing, importing, exporting, keeping, concealing, buying, selling, giving receiving, storing, administering, transporting, *carrying*, sending, delivering, procuring, supplying or distributing any dangerous drug otherwise than under the authority of this Act or the regulations made under the Act;…
>
> (Emphasis added.)

[20] However, the mere act of carrying is not sufficient to constitute the offence of trafficking. This is clearly explained by Lord Diplock in *Ong Ah Chuan v Public Prosecutor*; *Koh Chai Cheng v Public Prosecutor* [1981] 1 MLJ 64, where at p 68 he observed:

> To 'traffic' in a controlled drug so as to constitute the offence of trafficking under s 3 involves something more than passive possession or self-administration of the drug; it involves doing or offering to do an overt act of one or other of the kinds specified in paragraph (a) of the definition of 'traffic' and 'trafficking' in s 2. Even apart from any statutory definition, the ordinary meaning of the verb 'to traffic', in the particular context of trafficking in goods of any kind, imports the existence, either in fact or in contemplation, of at least two parties: a supplier and a person to whom the goods are to be supplied. This concept, involving transfer of possession, is reflected in the statutory definition itself. Of the seven verbs used to describe the various kinds of overt acts which constitute trafficking 'transport' is sandwiched between 'sell, give, administer' which precede it and 'send, deliver or distribute' which follow it. All of these other verbs refer to various ways in which a supplier or distributor, who has drugs in his possession, may transfer possession of them to some other person. 'Transport', although it must involve possession of the drugs by the person who transports them, is the only member of the heptad of verbs that is not inconsistent with the retention of possession of the drugs by him after their transport. It must mean moving the drugs from one place to another; it may mean moving them also to another person but it need not do so.
>
> Whether it bears the wider or the narrower meaning depends upon the context in which the verb appears. In their Lordships' view the immediate context of the verb 'transport', to which attention has been drawn, attracts the maxim *nosticur a sociis*. This, and the fact

that it appears in the definition of the verb to 'traffic', of which the natural meaning in the context of trafficking in goods involves dealings between two parties at least, and that the evident purpose of the Act is to distinguish between dealers in drugs and the unfortunate addicts who are their victims, all combine to make it clear that 'transport' is not used in the sense of mere conveying or carrying or moving from one place to another but in the sense of doing so to promote the distribution of the drug to another. Supplying or distributing addictive drugs to others is the evil against which s 3 with its draconian penalties is directed.

The Court of Appeal of British Columbia in *R v McDonald*, at p 342, interpreted 'transport' in the virtually identical definition of 'traffic' in the Canadian Narcotic Control Act, 1960-61, as bearing this restricted meaning and the same interpretation was adopted by the Court of Appeal of Newfoundland in *R v Greene*. Acceptance of it is implicit in the ratio decidendi of the Court of Criminal Appeal of Singapore in *Wong Kee Chin*.

So, simply to transport from one place to another a quantity of controlled drug intended for one's own consumption, if unauthorized by the Act or Regulation, involves an offence of having the drug in one's possession under s 6 but does not amount to the offence of trafficking under s 3. It is otherwise, however, if the transporter's purpose, whether it is achieved or not, is to part with possession of the drug or any portion of it to some other person whether already known to him or a potential purchaser whom he hopes to find. This is the consequence of s 10 of the Drugs Act and s 3(c) (which covers the same ground in part). These provisions make the question whether the transporter of the drugs achieves that purpose irrelevant to his guilt of the offence of trafficking under s 3, since they provide that a person who does any act preparatory to, or in furtherance of, or for the purpose of the commission of the offence of trafficking in a controlled drug, shall be guilty of the substantive offence of trafficking and liable on conviction to the penalty provided for it under s 29 and the Second Schedule.

This is a very wide description of acts that may be treated as equivalent to the substantive offence of trafficking; nevertheless, in their Lordships' view, it is clear from the structure of the Drugs Act and the distinction drawn between the offence of having a controlled drug in one's possession and the offence of trafficking in it, that mere possession of itself is not to be treated as an act preparatory to or in furtherance of or for the purpose of trafficking so as to permit the conviction of the possessor of the substantive offence. To bring the provisions of ss 10 and 3(c) into operation some further step or overt act by the accused is needed, directed to transferring possession of the drug to some other person; and it is a consequence of the clandestine nature of the drug trade and the means adopted for the detection of those engaged in it, that the further step that the prosecution is most likely to be able to prove in evidence is the act of the accused in transporting the drug to some place where he intends to deliver it to someone else, whether it be the actual consumer or a distributor or another dealer.

Proof of the purpose for which an act is done, where such purpose is a necessary ingredient of the offence with which an accused is charged, presents a problem with which criminal courts are very familiar. Generally, in the absence of an express admission by the accused, the purpose with which he did an act is a matter of inference from what he did. Thus, in the case of an accused caught in the act of conveying from one place to another controlled drugs in a quantity much larger than is likely to be needed for his own consumption the inference that he was transporting them for the purpose of trafficking in them would, *in the absence of any plausible explanation by him*, be irresistible — even if there were no statutory presumption such as is contained in s 15 of the Drugs Act.

As a matter of common sense the larger the quantity of drugs involved the stronger the inference that they were not intended for the personal consumption of the person carrying them, and the more convincing the evidence needed to rebut it. All that s 15 does is to lay down the minimum quantity of each of the five drugs with which it deals at which the

inference arises from the quantity involved alone that they were being transported for the purpose of transferring possession of them to another person and not solely for the transporter's own consumption. There may be other facts which justify the inference even where the quantity of drugs involved is lower than the minimum which attracts the statutory presumption under s 15. In the instant cases, however, the quantities involved were respectively one hundred times and six hundred times the statutory minimum.

Whether the quantity involved be large or small, however, the inference is always rebuttable. The accused himself best knows why he was conveying the drugs from one place to another and, if he can satisfy the court, upon the balance of probabilities only, that they were destined for his own consumption he is entitled to be acquitted of the offence of trafficking under s 3.

[21] The above passage was quoted with approval by the Court of Appeal in *Mohamad Yazri bin Minhat v Public Prosecutor* [2003] 2 MLJ 241 where the court upheld the finding of trafficking by the trial judge on the facts and in the circumstances of the case, at p 249, Gopal Sri Ram JCA stated the position as follows:

To summarize, the fact that the accused is transporting a quantity of drugs from one point to another does not make him a trafficker. Whether he is a trafficker in those circumstances depends on the facts and circumstances of the given case, including the quantity of the drugs and any transaction the accused proposed to enter into.

Applying the common sense approach laid down by Lord Diplock in *Ong Ah Chuan*, the learned judge's conclusion that the appellant was guilty of trafficking is abundantly justified.

This is how the learned judge put it at p 24 of his judgment:

> I find the story and the defence of the accused has not raised any reasonable doubt on the prosecution case that he was in exclusive control and custody of the cannabis in the car at about 4.30pm on 17 January 1997 and that he was aware of the nature of the cannabis in the car — that he was in possession of the cannabis — and that he transported the cannabis in the car from outside Kg Chubadak Dalam to Kg Cubadak Dalam, Sentul Pasar. I find him guilty on the charge save that the date and time of the offence is amended to read as occurring on 17 January 1997 at about 4.30pm. And I convict the accused on the charge.

We find counsel's attack on this finding by the learned judge to be without merit. It is plain and obvious from a reading of the judgment as a whole that the learned judge had the large quantity of drugs here in the forefront of his mind. The several passages in his judgment reflect the learned judge's satisfaction that the appellant could not have had such a large quantity of drugs in his possession, custody and control save for the purpose of trafficking it to others known or unknown. That explains the transporting by the appellant of the drug in the car in which it was found. For the reason we must with respect reject the arguments advanced to us by learned counsel for the appellant.

The decision in *Mohamad Yazri bin Minhat* was upheld by the Federal Court.

[22] In the present case, the drug was carried in small plastic packets each containing small quantity of the drug. According to the evidence, 39.77g of heroin was found in a number of small plastic packets tucked in his waist, while 50 small plastic packets containing 9.09g of heroin was found in the right side pocket and another 30 small plastic packets containing 5.57g of heroin was found in the left side

pocket of the track top he was wearing. 20 small plastic packets were found in each of the right and left pockets of his trousers, containing a total of 7.66g of heroin. Judging from the manner the drug was being carried, ie in small plastic packets and taking into account the total amount of the drug involved, the reasonable inference that may drawn is that the respondent was in fact carrying it for the purpose of trafficking. And bearing in mind the large quantity of the drug involved, it cannot be seriously contended that the drug was for his own consumption. In any event, it was never suggested in his defence that it was so. His defence was a mere denial that the drug was ever found on him. This was rejected by the learned trial judge. We are satisfied he was not just a passive carrier. Armed with these facts, we are satisfied that had the learned trial judge properly directed himself, he would nonetheless have come to the same finding. In the circumstances, we hold that the Court of Appeal ought to have applied the proviso to s 60(1) of the CJA and uphold the conviction and sentence notwithstanding the misdirection by the learned trial judge. For the above reasons, this appeal is allowed and the order of the Court of Appeal is set aside. Accordingly, the conviction and sentence imposed by the High Court are reinstated and affirmed.

Appeal allowed. Conviction and sentence imposed by High Court are reinstated and affirmed.

Reported by Loo Lai Mee